Gasing Heights Sdn Bhd v Pilecon Building Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — NOTICE OF ORIGINATING MOTION NO R2-25-94 OF 1999
FAIZA TAMBY CHIK J
25 NOVEMBER 1999

***Arbitration** — Award — Setting aside — Failure to consider principles of concurrent delay and overlapping works as required by PAM Form architectural practice — Whether award should be set aside*

Pursuant to a building contract which incorporated the standard PAM Form, the applicant appointed the respondent as contractor to carry out the work for certain project ('project works'). Disputes arose between the parties whereupon arbitration proceedings were commenced. The respondent alleged that the applicant's architect issued late instructions requiring the respondent to relocate the TNB substation and the late instruction caused delay to the respondent's project works. It was further alleged that the days extension of time ('EOT') granted by the architect was insufficient and the arbitrator was required to assess the proper EOT due to the respondent. According to the respondent's work programme, construction should begin soon after the respondent had taken possession of the site. Based on the respondent's work programme, the arbitrator granted EOT to the respondent from the original completion date to the date of the commissioning of the mechanical & engineering ('M & E') services. The arbitrator did not consider the principles of concurrent delay and overlapping works as required by the PAM Form architectural practice. The arbitrator also made a finding that the respondent was blameless and did not contribute to any delay. The applicant filed an originating motion to set aside the award of the arbitrator.

Held, setting aside the award of the arbitrator:

(1) Although the respondent's work programme had bars representing various M & E activities, the TNB substation was not specifically indicated anywhere in the respondent's work programme. Thus, it was impossible for the arbitrator to rely on the respondent's work programme as evidence to show that the construction of the TNB substation was supposed to have commenced soon after the respondent had taken possession of the site. Where the arbitrator relied on the respondent's work programme as 'evidence of certain facts', but it was then shown that the respondent's work programme did not contain any such 'facts', then there was an error of law on the face of the award (see pp 628H–629A).

(2) The arbitrator equated the EOT to be granted as being equal to the extra time period taken by the respondent to commission the M & E services. This was incorrect. The arbitrator must assess the

delay caused by the relocation of the TNB substation and not simply equate the EOT to the extra time period taken by the respondent to commission the M & E services. The methodology used by the arbitrator was wrong in law. It was an error of law on the face of the award when the arbitrator did not assess EOT in accordance with the principles imposed by the PAM Form, architectural practice and the law, namely the issues of concurrent delays and overlapping works (see pp 629C–D, F, 633B).

(3) It was an error of law on the face of the award when the arbitrator did not take into account the principle of concurrent delays in the mistaken belief that the relevant authorities had not been submitted when in truth such authorities had been submitted. In the circumstances where parties made written submissions, the arbitrator erred in law and equity when he did not give time or opportunity to the applicant to assist and correct the arbitrator's mistaken belief with respect to the purported 'missing' authorities on the principle of concurrent delays. It was also an error of law on the face of the award when the arbitrator took into account authorities that were not relevant to the issue of assessment of extension of time (see p 633C–D).

(4) The arbitrator artificially and erroneously confined his assessment of EOT to the narrow issue of whether the relocation of the TNB substation delayed the commissioning of the M & E services, without considering whether the respondent's own acts and delays also delayed the completion of the M & E services and/or the project works as a whole. The arbitrator was wrong in law on the face of the award to hold the respondent blameless of delay when he had only considered a period of less than one month out of a total period of some 36 months (see pp 633E–F, H–634A).

[Bahasa Malaysia summary

Menurut satu kontrak pembinaan yang mengandungi Borang PAM yang standard, pemohon telah melantik responden sebagai kontraktor-kontraktor untuk menjalankan kerja-kerja bagi projek tertentu ('kerja-kerja projek'). Pertikaian telah timbul antara pihak-pihak tersebut di mana prosiding timbangtara telah dimulakan. Responden mendakwa bahawa arkitek pemohon telah mengeluarkan arahan yang lambat yang menghendaki responden menempatkan semula pencawang TNB dan arahan yang lewat tersebut telah menyebabkan kelewatan kepada kerja-kerja projek responden. Adalah didakwa lagi bahawa hari-hari lanjutan tempoh masa ('LTM') yang diberikan oleh arkitek tidak mencukupi dan penimbangtara dihendaki menilai LTM yang betul tertangguh kepada responden. Menurut program kerja responden, pembinaan sepatutnya bermula sejurus selepas responden telah mengambil milikan kawasan tersebut. Berdasarkan program kerja responden, penimbangtara telah memberikan LTM kepada responden daripada tarikh sebenar penyiapan sehingga tarikh perkhidmatan mekanikal dan jurutera ('M & E') dilakukan. Penimbangtara tidak mempertimbangkan

A prinsip-prinsip kelewatan serentak dan kerja-kerja yang bertindan sebagaimana yang dihendaki oleh amalan arkitek Borang PAM. Penimbangtara juga telah mendapati bahawa responden tidak boleh dipersalahkan dan tidak menyumbang kepada mana-mana kelewatan. Pemohon telah memfailkan usul pemula untuk mengetepikan award penimbangtara.

B

Diputuskan, mengetepikan award penimbangtara:

(1) Walaupun program kerja responden mempunyai batasan-batasan yang mewakili berbagai aktiviti-aktiviti M & E, pencawang TNB tidak secara khusus ditunjukkan di mana-mana di dalam program C kerja responden. Oleh itu, adalah mustahil untuk penimbangtara untuk bergantung kepada program kerja responden sebagai keterangan bagi menunjukkan bahawa pembinaan pencawang TNB sepatutnya telah dimulakan selepas responden telah mengambil milikan kawasan tersebut. Di mana penimbangara telah bergantung kepada program kerja responden sebagai D 'keterangan fakta-fakta tertentu', tetapi telah ditunjukkan kemudiannya bahawa program kerja responden tidak mengandungi apa-apa 'fakta' berkenaan, maka terdapat kesilapan undang-undang di dalam pemberian award tersebut (lihat ms 628H–629A).

E (2) Penimbangtara menyamakan LTM yang diberikan seperti sama dengan tempoh lebih masa yang diambil oleh responden untuk melakukan perkhidmatan M & E. Ini adalah tidak betul. Penimbangtara mesti menilai kelewatan yang disebabkan oleh penempatan semula pencawang TNB dan tidak sewenang-wenangnya menyamakan LTM dengan tempoh lebih masa yang F diambil oleh responden untuk melakukan perkhidmatan M & E tersebut. Metodologi yang digunakan oleh penimbangtara adalah salah di sisi undang-undang. Adalah kesilapan undang-undang di dalam pemberian award tersebut apabila penimbangtara tidak menilai LTM menurut prinsip-prinsip yang dikenakan oleh Borang PAM, amalan arkitek dan undang-undang, terutamanya G isu-isu kelewatan serentak dan kerja-kerja yang bertindan (lihat ms 629C–D, F, 633B).

(3) Adalah kesilapan undang-undang di dalam pemberian award tersebut apabila penimbangtara tidak mempertimbangkan prinsip-prinsip kelewatan serentak dengan anggapan yang silap H bahawa autoriti-autoriti yang relevan tidak dikemukakan di mana sebenarnya autoriti-autoriti tersebut telah pun dikemukakan. Di dalam keadaan di mana pihak-pihak telah membuat penghujahan bertulis, penimbangtara telah membuat kesilapan di sisi undang-undang dan ekuiti apabila beliau tidak memberi masa atau peluang kepada pemohon untuk membantu dan membetulkan I anggapan yang silap penimbangtara berhubung dengan autoriti-autoriti 'hilang' yang dimaksudkan tentang prinsip-prinsip kelewatan serentak tersebut. Ia juga adalah kesilapan di sisi undang-undang di dalam pemberian award tersebut apabila

penimbangtara telah mengambil kira autoriti-autoriti tersebut yang tidak relevan kepada isu penilaian lanjutan masa (lihat ms 633C–D). A

(4) Penimbangtara telah secara sekali imbas dan silap membataskan penilaian LTM kepada isu yang terperinci sama ada penempatan semula pencawang TNB telah melewatkan pelaksanaan perkhidmatan M & E, tanpa mempertimbangkan sama ada perbuatan dan kelewatan responden sendiri juga telah melewatkan penyiapan perkhidmatan M & E dan/atau kerja-kerja projek secara keseluruhannya. Penimbangtara telah salah di sisi undang-undang di dalam pemberian award tersebut apabila memutuskan reaponden tidak bersalah terhadap kelewatan tersebut sedangkan beliau telah hanya mempertimbangkan satu tempoh yang kurang daripada sebulan daripada tempoh keseluruhan sebanyak 36 bulan (lihat ms 633E–F, H–634A).] B C

Notes D

For cases on setting aside of an arbitration award, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–979.

Cases referred to

Balfour Beatty Buildings Ltd v Chestermount Properties Ltd 62 BLR 1 (refd) E

Belsfield Court Construction Co Ltd v Pywell [1970] 1 All ER 453 (refd)

Chiam Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority & Anor [1994] 3 CLJ 605 (refd)

Dodd v Churton [1897] 1 QB 562 (refd)

Government of Kelantan v Duff Development Co Ltd [1923] AC 395 (refd) F

Pattison & Co Ltd v Allied National Corp Ltd [1953] 1 Lloyd's Rep 520 (refd)

Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor [1957] MLJ 231 (refd)

Russel v Viscount Sa da Bandeira (1862) 13 CBNS 149 (refd) G

Legislation referred to

Arbitration Act 1952 ss 23, 24

HL Goh (*SK Yeoh & Jeganathan*) for the applicant. H

N Sivananthan (*Sivananthan & Co*) for the respondent.

Faiza Tamby Chik J: This is an originating motion dated 2 September 1999 (encl 1) seeking inter alia orders that Interim Award No 2:

(a) be set aside; or

(b) be remitted to the learned arbitrator for reconsideration. I

Interim Award No 2 is set out in the applicant's affidavit dated 7 September 1999 (encl 2 p 85 exh CSH–11). Gasing Heights Sdn Bhd, the applicant in

this originating motion ('the applicant') is the owner and developer of a project known as:

> Carrying out and Completing the Main Building Works of the Proposed Condominium Development (Phase 2) on sub-lots PT 625–632, 641–643 and 645–648, s 5, Mukim 5, Petaling Jaya, Selangor Darul Ehsan ('the project').

and the respondent, Pilecon Building Construction Sdn Bhd, the respondent in this originating motion ('respondent'), is a contractor by business and trade.

Pursuant to a building contract dated 2 March 1994 ('the building contract'), which incorporated the standard PAM Form 1969 edition ('PAM Form'), the applicant appointed the respondent as contractor to carry out the works for the project ('the project works'). Disputes arose between the applicant and the respondent with respect to the building contract and the project works, whereupon arbitration proceedings ('arbitration') were commenced. The parties in the arbitration are:

(a) The respondent in the arbitration is the applicant herein;

(b) The claimant in the arbitration is the respondent herein.

By the joint letter of appointment dated 7 September 1995, the arbitrator was selected, appointed and was required to publish written reasoned awards (as opposed to granting silent awards) (see applicant's affidavit dated 7 September 1999 encl 2 p 27 exh CSH–3).

During the arbitration, the arbitrator was required to render his decision with respect to Issue No 2, which by agreement and consent of the parties Issue No 2 is set out in the arbitrator's directions dated 17 November 1998, wherein the arbitrator was required to ascertain facts and consequences thereof (see applicant's affidavit encl 2, p 33 exh CSH–6). Interim Award No 2 was published on the 20 August 1999. Whereupon, the applicant filed this originating motion seeking inter alia to set aside or remit Interim Award No 2 pursuant to s 23 and s 24 of the Arbitration Act 1952.

In deciding whether to set aside or to remit an arbitrator's award, the court will not generally examine or go into the facts and merits of the arbitration. The court will primarily confine its attention to the content of the award. The court will not set aside an arbitrator's adjudication simply because the court would itself have come to a different conclusion. The court will however set aside an arbitrator's decision if it is shown that there is an 'error of law on the face of the award'.

In *Government of Kelantan v Duff Development Co Ltd* [1923] AC 395, the House of Lords said at p 409:

> If this be so, I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court

> only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally — for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose.

It is an error if reference is made to inadmissible evidence. There is an 'error of law on the face of the award', if the arbitrator refers to evidence that is not legally admissible. It is an error if principles of construction not countenanced by the law are applied. There is also an 'error of law on the face of the award', if the arbitrator applies principles not permitted or recognised by the law.

The expression 'on the face of the award' should not be interpreted restrictively.

The case of *Chiam Tau Tze & Anor v The Sarawak Land Consolidation and Rehabilitation Authority and Anor* [1994] 3 CLJ 605 very clearly states that the expression 'on the face of the award' will include documents and evidence incorporated into the award or referred to in the award by the arbitrator as a basis for his decision. At p 610, Richard Malanjun J said:

> However, reference to extrinsic evidence is permissable if such evidence has been incorporated in the award. ... And on perusal of the Award No 2 in this case there is no doubt that the learned arbitrator did make reference to the points of defence not only by way of elaboration or itemisation but also as a basis for making the award No 2. In other words, the award No 2 'can really only be understood by reference' to the points of defence (see *Belsfield Court Construction Co Ltd v Pywell*). I rule therefore that the points of defence should be taken as having been incorporated in the award No 2.

In other words, if an award refers to a document or evidence as the basis for the decision, or the decision of the arbitrator can only be understood by reference to that document or evidence, then that document or evidence is deemed incorporated into the award and become available for review by the court.

For an understanding of what is meant by 'incorporation into an award', reference is made to *Belsfield Court Construction Co Ltd v Pywell* [1970] 1 All ER 453 which was cited with approval in *Chiam Tau Tze & Anor*. In *Belsfield Court Construction*, Willis J said at p 455:

> I simply refer for the purposes of this part of counsel for the claimants' submission to what Denning LJ said in the *Blaiber* case:
>
> > 'I have a strong suspicion that the arbitrators went wrong in law, but we are not able to say so without looking at the contract, because the terms of the contract may vary the ordinary legal rights and implications. The difficulty is that we are not at liberty to see this contract. It is not expressly incorporated into the award, nor can I see that it is impliedly incorporated. The question whether a contract, or a clause in a contract, is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says: "On the wording of this clause I hold" so-and-so, then that clause is impliedly incorporated into the award because he

A invites the reading of it; but if an arbitrator simply says: "I hold that there was a breach of contract", then there is no incorporation. In this case there is simply a recital of a contract which is not incorporated into the award and therefore we cannot look at it. I have no regrets on this score.'

Therefore in the instant case, the respondent has referred to evidence and/ or documents, so incorporated by the arbitrator into Interim Award No 2.

B

The respondent (as contractor) alleged as follows:

(1) That originally, the respondent was to construct the TNB substation at location 'A';

(2) That the applicant's architect then issued purported late instructions C requiring the respondent to 'relocate the TNB substation' to location 'B';

(3) That his purported late instruction for the 'relocation of the TNB substation' caused delay to the respondent's project works;

(4) That the days extension of time ('EOT') granted by the architect for D the 'relocation of the TNB substation' was insufficient and required the arbitrator to assess the proper EOT due to the Respondent.

(see Interim Award No 2 p 5 para B to p 7 para D in applicant's affidavit encl 2, exh CSH–11, pp 89–91).

The applicant (as employer) in defence contended inter alia as follows:

E

(1) That the 'relocation of the TNB substation' only caused minimal delay to the claimant and the architect had awarded reasonable EOT to the respondent;

(2) That the respondent's own witness ('CW1') had admitted in cross-examination, that the respondent only started work on the TNB F substation about one month after the respondent had received all the instruction and drawings required to commence work on the 'relocated TNB substation'. This proved that even when the architect's instructions and all the required drawings were issued to the respondent (as contractor), the respondent were in fact not ready to commence work on the TNB substation. Thus delay (if any) caused G by the relocation of the TNB substation was minimal (if at all) and there should be no increase in the EOT granted by the architect. That this admission by CW 1 was never explained or rebutted by the respondent whether by re-examination or documentary evidence in any way throughout the arbitration.

H (See Interim Award No 2 p 7 para E to p 13 para D in applicant's affidavit encl 2, exh CSH–11, pp 91–97).

It is observed that the respondent had received all the instruction and drawings for the 'relocated TNB substation' by the 8 March 1994 is a finding of fact by the learned arbitrator (see Interim Award No 1 p 3, I para 5.2 in applicant's affidavit encl 2, exh CSH–7, p 38), and that the respondent only commenced work on the TNB substation in April 1994 is also a finding of fact by the arbitrator. (See Interim Award No 1, p 3 para 5.2 in applicant's affidavit encl 2, exh CSH–7, p 39).

In Interim Award No 2, p 16 para F (see applicant's affidavit encl 2, exh CSH–11, p 100) the arbitrator states as follows:

> Senior counsel for the respondent (namely, the applicant in this OM) has adumbrated that there was some delay by the claimant (namely, the Respondent in this OM) in starting works after the receipt of the structural drawings but the claimant has explained this and I have dealt with this in my interim award.

In other words, the arbitrator is stating that he had dealt with the 'period of delay between instructions/drawings and commencement of works' in the following manner. That he has made a finding on or referred to the claimant's 'explanation' for the delay and that he had also dealt with or made some finding with respect to the 'period of delay between instructions/drawings & commencement of works' in his interim award. No matter how one cannot find any evidence, finding or reference in any interim award that of any 'explanation' offered by the respondent for the 'period of delay between instructions/drawings & commencement of works' and one also cannot find any evidence or reference in any interim award where the arbitrator 'dealt with' or made any finding with respect to the 'period of delay between instructions/drawings & commencement of works'.

Therefore as submitted by the applicant where it is shown that the 'explanation', 'the dealing with' or 'the finding' referred to by the arbitrator does not exists, then there is an 'error of law on the face of the award'. The arbitrator has referred to or relied on evidence which does not exist.

In Interim Award No 2 p 17 para E (see applicant's affidavit encl 2, exh CSH–11, p 101), the arbitrator stated as follows:

> For the above reasons, I therefore set aside the 102 days EOT granted by the architect for Block A and substitute instead the EOT to run ... .

In other words, the arbitrator confirms that he relied on the 'above reasons' when deciding to set aside the EOT granted by the architect and substituted with the arbitrator's own EOT. As one of his 'reasons', the arbitrator relied on the respondent's work programme as 'evidence of various facts'. In Interim Award No 2, p 17 para B (see applicant's affidavit encl 2, exh CSH–11, p 101), the arbitrator states as follows: 'the importance of completing the TNB substation early was clearly marked in the work programme submitted by the claimant (namely the respondent in this OM) to the architect. According to the work programme, construction should begin soon after the claimant had taken possession of the site.' The respondent work programme relied on by the arbitrator, is exh C1 Annexures 5A and 5B (in applicant's affidavit encl 2, exh CSH–12, p 113 and 114). No matter how one cannot find the TNB substation 'marked or identified' anywhere on the respondent's work programme. Although the respondent's work programme has bars (namely items 36 to 45) representing various Mechanical & Engineering ('M & E') activities, the TNB substation is not specifically indicated anywhere in the respondent's work programme. Thus, it was therefore impossible for the arbitrator to rely on the respondent's work programme as evidence to show that the construction of the TNB substation was supposed to have commenced

'soon after the claimant had taken possession of the site'. I am of the view that where the arbitrator relies on the respondent's work programme as 'evidence of certain facts', but it is then shown that respondent's work programme does not contain any such 'facts', then there is an 'error of law on the face of the award', and I so hold.

In Interim Award No 2, p 17 para E (refer applicant's affidavit encl 2, exh CSH–11, p 101) the arbitrator stated as follows: In my opinion, a fair and reasonable EOT for Block 2A would be from 6 March 1994 (original completion date) to 26 February 1995 (the date of the commissioning of the M & E Services).

For the above reasons, I therefore set aside the 102 days EOT granted by the architect for Block A and substitute instead the EOT to run from 6 March 1994 to 26 February 1995. In so doing, the arbitrator automatically equates the EOT to be granted as being equal to the extra time period taken by the respondent to commission the M & E Services, namely 357 days (namely, 6 March 1994 to 26 February 1995). This is incorrect. The arbitrator must assess the delay caused by the 'relocation of the TNB substation' and not simply equate the EOT to the extra time period taken by the respondent to commission the M & E Services, namely 357 days (namely, 6 March 1994 to 26 February 1995).

> It is essential to appreciate in EOT computations that the period of extension to be granted is the effect (actual or estimated) that the delaying event had (or will have) on the date for completion. We are not concerned with the recording of immediate or direct consequence of the event on the carrying out of the work, for its effect on the final outcome may be very different, not least because it is the contractor's duty to mitigate the effect of a delaying event as far as he reasonably can with his intended level of resources.

(See book *Construction Law in Singapore & Malaysia* (2nd Ed) at p 312).

Just because the respondent took an extra 357 days from the original completion date to complete the TNB substation and commission the M & E Services, it does not automatically mean that the 'relocation of the TNB substation' caused 357 days delay to the respondent. The methodology used by the arbitrator is wrong in law for the following reasons:

(1) It leads to an absurdity. The arbitrator's methodology means that if the respondent had happened to take 400 extra days to complete the relevant works, then EOT would summarily without any further justification, also have been extended to 400 days. The arbitrator's methodology runs contrary to the accepted principles of assessing EOT;

(2) Fails to consider the obligation on respondent as contractor, to mitigate delays. This method also negates the respondent's contractual obligation to mitigate the effects of delay howsoever caused. Pursuant to cl 23 (last paragraph) of the PAM Form (see applicant's affidavit encl 2, exh CSH–2, p 16), the respondent is under a duty regardless of who or what causes a delay to mitigate the delay.

(3) The arbitrator failed to apply principles countenanced by the law. Further, in assessing EOT, the arbitrator is obliged to assess EOT in the same manner and in compliance with the same principles imposed upon the architect by the PAM Form, architectural practice and the law. The arbitrator cannot apply his personal methodology of assessing EOT and ignore the principles countenanced by the PAM Form, architectural practice and the law. The PAM Form and architectural practice requires the arbitrator to take into account inter alia the principle of 'concurrent delays' when assessing EOT.

In assessing EOT, the assessor (architects and arbitrators alike) must take into account the issue of 'concurrent delays'. In *Law and Practice of Construction Contract Claims* (2nd Ed) by Chow Kok Fong, the writer said:

> 'Concurrent delays' is an expression which describes a situation where there are two or more causes or delay operating at a particular point of time and at least one of these causes is outside the contractor's control. Consider the situation where a contractor, as a consequence of his own shortcomings, fail to keep with the progress of the works with the result that he could not begin an important activity on the start date stipulated in the construction programme. However, because the employer's engineers had delayed in supplying the necessary drawings and instructions for the same activity at the scheduled date, the contractor would not have been able to commence work on the same activity even if he had been ready. The situation is complicated because it is difficult, on the usual principles, to determine firstly the precise chain of causation exerted by these events on the overall contract programme and secondly the settlement of questions relating to liquidated damages and extensions of time.
>
> Abrahamson suggested that in such a situation, the important consideration is whether the contractor had been held up by 'delay' outside his control. The employer's act of prevention is thus inconsequential if it does not constitute the critical cause of delay, ie the delay would still have occurred even if there had been no act of prevention. This approach has the attraction of simplicity and, perhaps more importantly, consistency in the final result. Abrahamson observed:
>
> > ['This] conclusion does have the perhaps unfair result that the employer may be entitled to recover liquidated damages from the contractor for the delayed completion even though the employer was not in a position to allow the contractor to complete earlier, but any other principle could lead to much confusion in substituting for an examination of whether the contractor actually was delayed by a cause beyond his control, a wide ranging examination into all events that could have caused delay had the contractor's progress been different.'

The principle of 'concurrent delays' requires the assessor of EOT to consider the actual progress of works *in situ* at the relevant time when assessing the actual or estimated delay caused by the 'relocation of the TNB substation'. This issue of 'concurrent delay' is particularly critical when the arbitrator's own findings of facts show that when all the instructions and drawings were provided to the respondent (as contractor) by the 8 March 1994, the respondent was itself so delayed that the respondent could not commence the works on the TNB substation until about one month later.

In Interim Award No 2, p 14 para D (see applicant's affidavit encl 2, exh CSH–11, p 98) the arbitrator stated as follows:

> Next, it is the contention of senior counsel for the respondent (namely the applicant in this OM) that the claimant (namely the respondent in this OM) were always running late and never kept with any works programme. No authority has been cited by senior counsel to support this proposition that this is a factor to be taken into account by the architect in assessing EOT. On the contrary, in my opinion, this seems to be an irrelevant factor having regard to the authorities of *Russel v Viscount Sa da Bandeira* (1862) 13 CBNS 149 and *Dodd v Churton* (1897) 1 QB 562.

It is also observed that when the applicant raised the issue of 'concurrent delays', the arbitrator held that the principle of 'concurrent delays' was an 'irrelevant factor' and that 'no authority had been cited by senior counsel'. It is noted that the applicant had as early as July 1996 together with the applicant's written submission dated 27 July 1996 submitted a bundle of authorities containing authorities on the principle of 'concurrent delays' to the arbitrator. Inter alia, the following authorities on 'concurrent delays' were submitted to the arbitrator:

(1) *Law and Practice of Construction Contract Claims* by Chow Kok Fong (2nd Ed) pp 167–168;

(2) *Raymond Constructors of Africa v United States* 188 Ct Cl 147 1969;

(3) Fishbach & Moore International Corp ASBCA No 18146.

It must be noted that all submissions for Interim Award No 2 were made in writing by the parties. Because submissions were made in writing, the applicant never knew until after the publication of Interim Award No 2, that the arbitrator had forgotten about the authorities cited by the applicant with respect to 'concurrent delays'. Even if authorities had not been cited (which is not the case), the arbitrator ought to have at least informed the applicant that the arbitrator required authorities. The arbitrator ought not to reject the applicant's submission in such a summary manner.

It is submitted that the arbitrator misread and/or misapplied the case of *Russel v Viscount Sa da Bandeira* (1862) 13 CBNS 149 and *Dodd v Churton* (1897) 1 QB 562. The above authorities state that if the employer causes a delay, and where there is no contractual provision that permits the granting of the EOT for such delay, then the employer is not entitled to claim liquidated damages against the contractor. However, for Issue No 2 and Interim Award No 2, it had already been adjudicated that the 'relocation of the TNB substation' is a delay covered by cl 23 of the PAM Form and the EOT can be granted. The only issue is how much EOT should be granted. Therefore these cases are not relevant and these cases do not preclude the application of the principle of 'concurrent delays' when EOT is to be assessed. In assessing EOT, the assessor (architects and arbitrators alike) must also take into account the issue of 'overlapping works'. *Balfour Beatty Buildings Ltd v Chestermount Properties Ltd* 62 BLR 1 is a contract case about liquidated damages and extension of time-effect of variations required during period of 'culpable delay', whether extension of time should be 'net' or 'gross', this is what Colman J said at p 31:

> Against this background the contention that the 'gross' method is 'fair' to both parties cannot stand up. If a contractor overshoots the previously-fixed completion date he must pay liquidated damages for the whole of the period

> of time from that date to practical completion unless the architect subsequently extends the time for completion by reason of a relvant event by retrospectively postponing the completion date. If the relevant event is a variation instruction the architect will have to consider whether it is fair and reasonable that the contractor's total period of time for completion should be increased. If the variation works can reasonably be conducted simultaneously with the original works without interfering with their progress and are unlikely to prolong practical completion, the architect might properly conclude that no extension of time was justified. He would therefore leave the completion date where it was. That would leave the contractor to pay liquidated damages for the amount of time by which he had exceeded the original period of time for completion. His continuing liability to pay liquidated damages while he is at the same time carrying out the variation works does not reflect an assumption by him of the risk of loss of time due to what would otherwise be an act of prevention. It merely reflects his breach of contract by failing to complete the original works within the original or last-fixed contract period for completion.

That this principle of 'overlapping works' as expressed in *Balfour Beatty* is applicable to the PAM Form 1969 edition is confirmed by *Construction Law in Singapore & Malaysia* (2nd Ed) pp 312–313 which stated:

> It is essential to appreciate in EOT computations that the period of extension to be granted is the effect (actual or estimated) that the delaying event had (or will have) on the date for completion. We are not concerned with recording the immediate and direct consequence of the event on the carrying out of the work, for its effect on the final outcome may be very different, not least because it is the contractor's duty to mitigate the effect of a delaying event as far as he reasonably can with his intended level of resources. Delay in one trade does not necessarily affect the others, and delay in one section or phase may be overcome by rescheduling or temporarily transferring production resources to another.
>
> This principle, however, is subject to a proviso that distinguish 'net' from 'gross' extensions of time during a period of culpable delay. As long as the work on the site is continuing and Practical Completion (or its equivalent) has yet to be attained, the contract administrator retains his powers of instruction (including variation) and the work remains subject to other delay risks which could normally give rise to a legitimate claim for extension. In the assessment of EOT arising in such a situation, the contractor may argue that regard should be had to the date which then is reasonably possible of attainment following the delay (the 'gross' method), but this has the effect of wiping out the contractor's liability for previous delays and ignoring the true purpose of EOT which is to provide a basis for the computation of liability to LD. The 'net' method - assessment of the period of delay caused by the event and adding this period to the previously established date for completion - could have the anomalous result of fixing a date for completion of work (inclusive of a late variation order) that falls before the date on which the variation order was issued; but nevertheless this method of assessment more truly reflects the total construction period that should be allowed to the contractor and its end date from which LD should fairly be computed; see *Balfour Beatty v Chestermount.*

A reading of Interim Award No 2 will show that notwithstanding the issue of 'overlapping works' was raised by the applicant, the arbitrator never considered the issue of 'overlapping works' at all. This is not unexpected where the arbitrator had already discounted the principle of 'concurrent

delays'. The principle of 'concurrent delays' and 'overlapping works' are closely related in that both principles require the arbitrator to consider the actual progress of work *in situ* or on site, at the relevant time. And the arbitrator had already mistakenly decided that the actual progress work on site at the relevant time is an 'irrelevant factor'. I am of the view that it is an 'error of law on the face of the award' when the following occurs:

(1) When the arbitrator does not assess EOT in accordance with the principles imposed by the PAM Form, architectural practice and the law. Namely the issues of 'concurrent delays and overlapping works';

(2) When the arbitrator does not take into account the principle of 'concurrent delays' in the mistaken belief that the relevant authorities have not been submitted (when in truth such authorities had been submitted);

(3) In the circumstances where parties made written submissions, the arbitrator erred in law and equity when he did not give time or opportunity to the respondent to assist and correct the arbitrator's mistaken belief with respect to the purported 'missing' authorities on the principle of 'concurrent delays';

(4) When the arbitrator takes into account authorities that are not relevant to the issue of assessment of extension of time.

If the issue of 'concurrent delays' and/or 'overlapping works' are not considered by the arbitrator, the arbitrator artificially and erroneously confines his assessment of EOT to the narrow issue of whether the 'relocation of the TNB substation' delayed the commissioning of the M & E Services, without considering whether the respondent's own acts and delays also delayed the completion of the M & E Services and/or the project works as a whole, and thus reduced the EOT to be granted, and whether the respondent's own acts and delays may have reduced the impact of the delay caused by the 'relocated TNB substation', and thus reduced the EOT to be granted. This means that the assessment of EOT by the arbitrator is contrary to the principles imposed by the PAM Form, architectural practice and the law.

In Interim Award No 2, p 16 para F and p 17 para A (in applicant's affidavit encl 2, exh CSH–11, pp 100–101) the arbitrator states as follows:

> In dealing with the EOT question, one of the factors which the architect must always bear in mind is whether the contractor can be regarded as contributing to the delay. In this case, I have in my interim award held and adjudged the claimant (as contractor) to be blameless. No evidence has been adduced by the respondent to contradict this finding.

The arbitrator states that he has made a finding in the interim awards that the respondent is 'blameless' and did not contribute to any delay and that 'no evidence' has been adduced to contradict such finding. The arbitrator has at all times only made a finding that the respondent did not cause any delay during the following specific period, 16 October 1994 to 31 October 1994 and 1 November 1994 (see applicant's affidavit encl 2, exh CSH–7, p 68 at para 18.1 (ii) & (iv)) . The arbitrator has made no other finding of fact with respect to the respondent's contribution to delay. In

other words, save for the limited periods 16 October 1994 to 31 October 1994 and 1 November 1994, the arbitrator did not make any other finding as to whether the respondent delayed the project works during other periods. It must be noted that the period of works lasted from May 1992 to 16 May 1995; a total of some 36 months. May 1992 being the month when site possession was granted to the respondent (as contractor). 16 May 1995 being the date when the certificate of practical completion was issued to the respondent. I am of the view that the arbitrator is 'wrong in law on the face of the award', to hold the respondent blameless of delay, when he had only considered a period of less than 1 month out of a total period of some 36 months. The arbitrator is also mistaken when he stated that the applicant has adduce 'no evidence' to support the applicant's contentions. His own summary of the applicant's submission in Interim Award No 2 page 9 para A to E (see applicant's affidavit encl 2, exh CSH–11, p 93) clearly shows that the applicant had referred the arbitrator to evidence in the form of site minutes and the testimony of RW3 to show the delay contributed by the respondent. But because thearbitrator had refused to consider the principle of 'concurrent delay', he summarily dismissed the evidence.

In *Pattison & Co Ltd v Allied National Corporation Ltd* [1953] 1 Lloyd's Rep 520, Pilcher J of the Queen's Bench Division held:

> ... that the arbitrator had failed to identify the documents on which he had based his findings; further that the documents before the court did not justify the arbitrator in making such findings; and that the award would accordingly be set aside.

In *Pegang Prospecting Co Ltd v Chan Phooi Hoong & Anor* [1957] MLJ 231 Mathew CJ said at p 233:

> In my view, justice cannot be done in this case by remitting the award to the arbitrator. He has consistently taken up the attitude that he would only decide questions which relates to mining and on which as a mining engineer he was competent to express an opinion, but anything relating to law he would not decide. The fact that he may have decided certain points of law without realising that he had done so aggravates the position.
>
> I can see no alternative but to allow this appeal with costs and order that the award be set aside. The deposit in court will be paid out to the appellants.

In the instant case, the arbitrator has not considered or applied the required and relevant principles required by the PAM Form and/or architectural practice when assessing EOT. Thus Interim Award No 2 is hereby set aside with cost.

Award of the arbitrator set aside.

Reported by Jafisah Jaafar